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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD DARNELL WALLACE,

Defendant and Appellant.

A124229

(Solano County  
Super. Ct. No. VCR187686)

Defendant was convicted of petty theft with a prior conviction. The prosecution proved his prior convictions using a CLETS<sup>1</sup> “rap sheet,” a list of prior arrests and convictions generated from a computer database maintained by the state. Defendant contends use of the rap sheet to prove his prior convictions violated his constitutional right to confront witnesses, and the prior convictions should have been stricken because he was not properly advised of his constitutional rights at the time he pleaded guilty in connection with them. We affirm the judgment, as we find the trial court did not err by admitting the rap sheet into evidence and refusing to strike the prior convictions. In addition, we hold defendant is entitled to additional presentence conduct credits under the 2009 amendments to Penal Code section 4019, because those amendments should be given retroactive effect.

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<sup>1</sup> “CLETS” is an abbreviation for the California Law Enforcement Telecommunications System.

## I. BACKGROUND

Defendant was charged in an amended information with second degree commercial burglary (Pen. Code, § 459) and petty theft with a prior conviction. A single prior conviction was alleged, dating from 1992. (Pen. Code, § 666.) The amended information also alleged defendant had suffered two prior prison terms for convictions in 1993 and 1999. (Pen. Code, § 667.5, subd. (b).)

On evidence he had shoplifted goods from a grocery store, the jury convicted defendant of petty theft and acquitted him of burglary, but it was unable to reach a verdict on the prior conviction alleged in the petty theft count. The prosecution was thereafter granted leave to file a second amended information alleging three additional prior convictions.

Defendant filed a motion to strike all four of the alleged prior convictions under *Boykin v. Alabama* (1969) 395 U.S. 238 (*Boykin*) and *In re Tahl* (1969) 1 Cal.3d 122 (*Tahl*) (disapproved on other grounds in *Mills v. Municipal Court* (1973) 10 Cal.3d 288, 306, fn. 16 and *People v. Howard* (1992) 1 Cal.4th 1132, 1175), arguing he had not been properly informed of his constitutional rights before entering guilty pleas with respect to each conviction. The motion was supported by a declaration of defendant stating he “believe[d]” he was not properly advised of his privilege against self-incrimination, right to a jury trial and right of confrontation prior to entering the pleas, and averring he would not have pleaded guilty had he understood those rights.

When the trial court held an evidentiary hearing on the *Boykin/Tahl* motion, however, defendant’s testimony failed to confirm the statements in his declaration. When asked about those statements, defendant explained he declared that he “believe[d]” he was not properly informed of his rights because he was not sure whether he was properly advised. According to defendant, he did not “remember it that well.” He acknowledged he did not know what “the proper rights are” and was unable to state in what way he had not been properly informed about them. He did not remember ever “hear[ing] anything about any rights,” although he acknowledged receiving and signing a paper regarding them. When asked on redirect whether he would have entered the guilty pleas had he

been advised of his rights, defendant answered, “I don’t understand the law, so I don’t know if I would or not.”

Denying the motion, the court noted, “Obviously, he doesn’t remember what happened. The testimony has contributed nothing to the state of whether or not he has been advised of his rights.” In light of the testimony, the court held, the declaration was entitled to “no weight . . . whatsoever,” concluding, “I have had nothing knowledgeable presented to me to indicate that there was a deprivation of rights.”

Following denial of the motion to strike, the four prior convictions were tried to a second jury. The prosecution’s primary evidence was defendant’s “rap sheet,” formally known as a “CLETS printout,” a listing of defendant’s prior arrests, convictions, and prison sentences derived from a computer database. The sole prosecution witness was a deputy district attorney (deputy DA) from Solano County who was called to explain how rap sheets are generated and used. The deputy DA testified the rap sheet is a statement of a defendant’s criminal history, compiled from information supplied by federal and local law enforcement authorities. When a defendant is arrested or convicted, an entry is made in the database from which the rap sheet is generated, with the defendant’s identity confirmed by fingerprints or palm prints. Rap sheets are used as a matter of course by district attorneys in determining how to charge and prosecute criminal defendants; the deputy DA estimated he had reviewed 10,000 rap sheets during his career. Defendant’s rap sheet contained entries indicating each of the four convictions alleged in support of the petty theft charge. On cross-examination, the deputy DA confirmed he had not been involved in the compilation or entry of any of the information on defendant’s rap sheet; rather, the entries were made by persons employed by counties for that purpose, at the time the various indicated events occurred. Defendant also presented two witnesses who testified to the unreliability of rap sheets.

After the trial court dismissed one of the charged prior convictions, the jury found the remaining three to be true, and the court found the prior prison terms to be true. Defendant was sentenced to the middle term of two years on the petty theft charge, with an additional year added for the prison term enhancement.

## II. DISCUSSION

Defendant contends (1) admission of the rap sheet violated his constitutional right of confrontation under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), (2) the trial court erred in denying his *Boykin/Tahl* motion, and (3) he was entitled to additional presentence work and conduct credits under amendments to Penal Code section 4019, enacted in 2009.

### A. Admission of Defendant's Rap Sheet

In *Crawford*, the Supreme Court held that, under the confrontation clause, a particular class of hearsay evidence, which the court referred to as “testimonial” hearsay, cannot be admitted in a criminal trial unless the defendant has the opportunity to cross-examine an appropriate witness with respect to the evidence. (*Crawford, supra*, 541 U.S. at p. 61.) While the court refused “to spell out a comprehensive definition” of testimonial hearsay in *Crawford* (*id.* at p. 68), the decision itself and subsequent cases have provided guidance as to the type of evidence so classified.

In *People v. Cage* (2007) 40 Cal.4th 965 (*Cage*), our Supreme Court, interpreting *Crawford* and *Davis v. Washington* (2006) 547 U.S. 813, drew several conclusions. “First, . . . the confrontation clause is concerned solely with hearsay statements that are testimonial, in that they are out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial. Second, though a statement need not be sworn under oath to be testimonial, it must have occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony. Third, the statement must have been given and taken *primarily* for the *purpose* ascribed to testimony—to establish or prove some past fact for possible use in a criminal trial. Fourth, the primary purpose for which a statement was given and taken is to be determined ‘objectively,’ considering all the circumstances that might reasonably bear on the intent of the participants . . . .” (*People v. Cage*, at p. 984, fns. omitted.)

Applying these general principles, prior decisions have held that neither the prior conviction records described in Penal Code section 969b nor CLETS rap sheets, when submitted to prove a prior conviction or prison sentence, are testimonial hearsay for

purposes of *Crawford*. (*People v. Morris* (2008) 166 Cal.App.4th 363, 368–372 (*Morris*) [rap sheet]; *People v. Taulton* (2005) 129 Cal.App.4th 1218, 1225 [§ 969b packet].) As *Taulton* reasoned, such records are not testimonial because they are prepared for the purpose of documenting the acts and events related to the convictions, rather than to prove events relevant to a criminal trial. While the records may ultimately be used in a criminal prosecution, that is not the reason for their preparation. (*Id.* at p. 1225.) Echoing this reasoning, *Morris* noted that the primary purpose of rap sheets “is to permit law enforcement to track necessary information regarding the arrest, conviction, and sentencing of individuals and to communicate that information to other law enforcement agencies.” (*Id.* at pp. 370–371.) The court cited the statute that authorized the creation of the CLETS system, Government Code section 15151, which described it as “an efficient law enforcement communications network available to all [law enforcement] agencies.” (*Morris*, at p. 371, fn. 9.) *Morris* is controlling here.

Defendant argues the reasoning of *Morris* was undercut by the Supreme Court’s more recent decision in *Melendez-Diaz v. Massachusetts* (2009) 129 S.Ct. 2527 (*Melendez-Diaz*), which held that a document attesting to the results of a laboratory drug analysis constituted testimonial hearsay. (*Id.* at p. 2532.) As the court reasoned, the certification was in essence testimony, since it was the equivalent of a declaration made for the purpose of establishing or proving a fact at trial. In fact, the court emphasized, the “sole purpose” of the document was “to provide ‘prima facie evidence of the composition, quality, and the net weight’ of the analyzed substance.” (*Ibid.*) Defendant contends, in light of *Melendez-Diaz*, the rap sheet should have been excluded because “they are created primarily to serve as evidence at trial.”

Although defendant contends *Melendez-Diaz* overturned *Morris*, the Supreme Court itself did not believe the decision worked a substantial change in confrontation clause law; as the court noted, the decision “involve[d] little more than the application of our holding in” *Crawford*. (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2542.) There is therefore no reason to think *Melendez-Diaz* would require a different result in *Morris*, which took full account of *Crawford*.

In any event, defendant's contention regarding the purpose for the creation of rap sheets is not supported by the evidence at trial. As *Morris* noted, and as the deputy DA testified, the information contained in rap sheets is collected for the administrative purpose of tracking individuals' criminal histories, not to prove prior convictions in court. While rap sheets may sometimes be used to prove prior convictions, this use is incidental to their intended function, which is to provide prosecutors and others a quick, accessible, and accurate means of evaluating the criminal histories of criminal suspects and convicted defendants. In contrast, the drug testing performed in *Melendez-Diaz* was done solely for the purpose of proving at trial that the defendant had possessed illegal drugs.

Defendant also argues a rap sheet is testimonial because "law enforcement [has] the reasonable expectation that the statements [in a rap sheet] will be used for prosecution." A reasonable expectation, however, is not the same as an intended purpose. As *Cage* noted, hearsay is not testimonial unless it was "given and taken *primarily* for the *purpose* ascribed to testimony—to establish or prove some past fact for possible use in a criminal trial." (*Cage, supra*, 40 Cal.4th at p. 984.) As discussed above, rap sheets are not created primarily for use at trial.

In addition, defendant contends the rap sheet should have been excluded because it is unreliable. While the testimony at trial demonstrated rap sheets sometimes contain errors, there was no abuse of discretion in the trial court's conclusion the document was sufficiently trustworthy for admission under a hearsay exception. Perfection is not required for such admission. (See *People v. Martinez* (2000) 22 Cal.4th 106, 130–131 [rap sheet sufficiently trustworthy to satisfy admission under Evid. Code, § 1280].) In the event the particular rap sheet admitted against defendant contained errors, defendant was, of course, free to prove those errors at trial.

Defendant also seems to argue there was insufficient foundational testimony to support admission of the rap sheet as an official record, noting the deputy DA had not himself made the entries on the sheet. We find no indication this objection was preserved at trial. In any event, the admission of a rap sheet has been held not to require such testimony. (*People v. Dunlap* (1993) 18 Cal.App.4th 1468, 1477–1480.)

Throughout his argument, defendant freely mixes constitutional arguments with arguments based in the law of evidence. We have done our best to address them separately. It is important to note, however, that exclusion of evidence under *Crawford* is not affected by the likely reliability, or lack thereof, of the proffered evidence. Even the most reliable hearsay evidence is subject to exclusion under *Crawford* if it is testimonial and no appropriate witness is available for cross-examination with respect to it. Conversely, hearsay that is not testimonial is admissible under *Crawford* so long as it satisfies a recognized hearsay exception. Characterization of a document as testimonial under *Crawford* is based not on its reliability but on the purpose for which the information was gathered. (*Cage, supra*, 40 Cal.4th at p. 984.) Defendant's argument the rap sheet should have been excluded under *Crawford* solely because it contains several levels of hearsay and therefore violated his "constitutional right to confront his accuser" misunderstands *Crawford*, as does his purported "constitutional" argument based on reliability.

#### **B. *Boykin/Tahl***

Defendant also contends the trial court erred in refusing to strike the prior convictions on the ground he was not adequately advised of his rights prior to entering a guilty plea to the charges.

In *Boykin*, as interpreted by *Tahl*, the Supreme Court held that a judicial officer must, when accepting a guilty plea, inform the defendant of each of three enumerated rights and obtain the defendant's express waiver of those rights. (*Boykin, supra*, 395 U.S. at p. 243; *Tahl, supra*, 1 Cal.3d at p. 130.) In *People v. Sumstine* (1984) 36 Cal.3d 909 at page 919, the Supreme Court held that a defendant may move to strike a prior conviction on grounds the conviction was obtained in violation of *Boykin* and *Tahl*. When such an allegation is made, the court held, the defendant is entitled to an evidentiary hearing at which the prosecution has the initial burden of demonstrating that a prior conviction occurred. The burden then shifts to the defendant to demonstrate his or her *Boykin/Tahl* rights were violated. If the defendant produces evidence tending to show such an infringement, the prosecution may not rely merely on silence in the record of the hearing

to overcome that showing. The burden, however, is ultimately on the defendant to prove his or her rights were violated. (*Sumstine*, at p. 923; see *People v. Allen* (1999) 21 Cal.4th 424, 439–440; *People v. Walker* (2001) 89 Cal.App.4th 380, 386.)

We find no error in the trial court’s conclusion defendant failed to satisfy his burden of producing evidence showing an infringement of his *Boykin/Tahl* rights. The only evidence of such an infringement was defendant’s testimony, and that testimony clearly showed defendant does not remember what happened at his plea hearings. His failure to remember is not evidence he did not receive the appropriate counseling. Rather, it renders his testimony of no weight in determining whether the counseling occurred, since it demonstrates he has no present reliable recollection of the events. Because his testimony was the only evidence offered, defendant failed to carry his burden of demonstrating his rights had been violated. This is exactly what the trial court held.

Defendant argues he made a sufficient showing to require the prosecution to provide affirmative evidence of compliance with *Boykin* and *Tahl*, but his argument is based on a highly selective reading of his own testimony. To state, as defendant does, that he “clearly and unambiguously testified that he had not been advised of his constitutional rights prior to entering a guilty plea deal” seeks to elevate a single line of testimony above the remainder. Read as a whole, the only point to emerge clearly and unambiguously from defendant’s testimony was, as the court held, he does not remember what happened. Accordingly, he failed to carry his burden.<sup>2</sup>

### ***C. Amended Penal Code Section 4019***

Penal Code section 4019 provides the method for calculating the credit to which a criminal defendant is entitled against his term of imprisonment for good behavior and work performance while in local custody prior to imposition of sentence. In 2009,

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<sup>2</sup> Defendant also argues his declaration was sufficient to carry his burden. The evidentiary content of the declaration was undercut, however, when defendant acknowledged his failure of memory. Anything stated in defendant’s declaration is entitled to no evidentiary weight since, as he conceded, he does not remember what happened.



following the imposition of defendant's sentence, the Legislature doubled these credits in an effort to reduce the state's expenses of incarceration. (Stats. 2009–2010, 3d Ex. Sess., ch. 28, § 50, pp. 5270–5271.) Because the legislation had not been passed at the time of his sentencing, defendant was not afforded the benefit of Penal Code amended section 4019 when judgment was entered.

There is no dispute, however, defendant is entitled to a doubling of the work and conduct credits in the judgment if the amendments to Penal Code section 4019 are retroactive, as he contends they are, because his conviction was not final at the time the amendments became effective on January 25, 2010. Whether the amendments apply retroactively has been the subject of a number of conflicting published decisions from the Courts of Appeal, and the issue is now before our Supreme Court. Two divisions of our own district have recently held in separate decisions that the amendments should be applied retroactively, reasoning section 4019, as amended, is an amendatory statute that mitigates punishment and therefore must be given retroactive effect under *In re Estrada* (1965) 63 Cal.2d 740, unless the Legislature has clearly indicated otherwise. While we cannot cite those decisions because they have been accepted for review, we find their reasoning persuasive.

In the reply brief, defendant's counsel states that on April 19, 2010, the trial court entered a second amended abstract of judgment granting defendant additional work and conduct credits under Penal Code amended section 4019. A copy of that new abstract has been filed with this court. Although the total credits in the new abstract do not agree with the calculation of credits in defendant's opening brief, counsel concedes in the reply brief that the original calculation was incorrect and does not dispute the accuracy of the credits granted in the second amended abstract of judgment. Accordingly, there is no need for a remand to correct the judgment on this ground.

### **III. DISPOSITION**

The judgment, as reflected in the second amended abstract of judgment, filed April 19, 2010, is affirmed.

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Margulies, Acting, P.J.

We concur:

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Dondero, J.

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Banke, J.